

FINAL CONVENING REPORT
FOR
HUD'S NEGOTIATED RULEMAKING ON THE ALLOCATION
OF TENANT-BASED SECTION 8 FUNDS
PREPARED FOR THE U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
AND OTHER STAKEHOLDERS
BY THE CONSENSUS BUILDING INSTITUTE, INC.

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I. INTRODUCTION

A. Background to the Negotiated Rulemaking

The U.S. Department of Housing and Urban Development (HUD) administers the tenant-based Section 8 rental housing assistance program. This program, established in 1974, assists roughly 1.4 million low-income households who need financial assistance to rent homes and apartments from private landlords. HUD distributes funds for Section 8 vouchers to 2,682 public housing agencies (PHAs) across the country.

In the early years of the tenant-based Section 8 program, HUD signed long term (10-15 year) contracts with PHAs across the country. These contracts authorized each PHA to lease a certain number of units each year, at a fixed cost per unit. Allowable costs were set using a Fair Market Rent (FMR) for each major housing market. The initial contracts also included an annual FMR adjustment for inflation. Over the years, rental housing costs in many local markets did not rise as fast as the adjusted FMR. Consequently, HUD accumulated very substantial (unspent) budgetary reserves.

Over the past twenty years, Congress, advocacy groups for the poor, and private rental housing owners have all supported the Section 8 program as an effective, market-based strategy for providing access to affordable rental housing for the poor. Since the mid-1990s, however, Congress, the General Accounting Office and other oversight bodies have raised concerns about the accumulation of unused budget authority for the Section 8 program.

In response to questions about its budgeting and accounting practices, HUD has moved to revamp its Section 8 allocation process. HUD has made a transition from multi-year contracts with PHAs to one-year renewable contracts, and from FMR-based funding allocation to allocations based on PHAs' actual costs. HUD and PHAs have a strong interest in finalizing renewal funding rules for expiring contracts soon, as a large number of long-term contracts are due to expire over the next three years.

HUD has also been making a number of changes to Section 8 program administration rules (e.g. reductions in the Fair Market Rent ceiling and in administrative fees, elimination of the 90-day vacancy requirement for reissuance of Section 8 certificates and vouchers). HUD has instituted a Section 8 Management Assistance Program (SEMAP) for HUD and PHA staff. HUD has also created a new, centralized data processing center for the Section 8 program, to be based in Kansas City.

While revising the Section 8 funding allocation process, HUD and other Section 8 stakeholders have also been affected by two other important changes. First, HUD has undertaken a number of initiatives through the Section 8 program to support welfare reform (e.g. the Family Self-Sufficiency and Family Unification Programs). To support these initiatives, HUD has given new mandates and new incentives to PHAs. Second, HUD's ongoing internal reorganization has led to significant staff turnover within the Section 8 program.

The combination of changes in Section 8 allocation procedures, new welfare reform initiatives, and HUD staff turnover has created significant communication and implementation challenges for HUD and other stakeholders. Not all of the administrative changes and new initiatives have been well-understood or welcomed by PHAs. A number of PHAs feel that these changes are adding unfunded mandates to their already overburdened administrative staff. Many of those who support the new initiatives feel they do not have clear guidance from HUD on how to implement them.

HUD has attempted to respond to PHAs' questions and concerns as quickly as possible, while simultaneously reorganizing program procedures and staffing. As a result, there is some frustration about the recent administration of the tenant-based Section 8 program among PHAs and HUD staff, and among advocates for affordable housing and poverty alleviation. HUD's leadership has responded by acknowledging the transition challenges, but also noting that the changes being made now should lead to substantial long-term benefits for families served by the program and for PHAs administering it.

In October 1998, the passage of the Quality Housing and Work Responsibility Act (QHWRA) accelerated the process of change in Section 8 allocation rules. In Section 556 of the Act, Congress mandated that HUD develop a rule within one year on renewal funding for its expiring tenant-based Section 8 annual contribution contracts (ACCs).

Congress indicated that the renewal formula should apply "an inflation factor based on local or regional factors to an allocation baseline." It also indicated that the baseline should "ensure continued assistance for the actual number of families assisted as of October 1, 1997, with appropriate upward adjustments for incremental assistance and additional families authorized subsequent to that date" (Quality Housing and Work Responsibility Act of 1998 (PL 105-26), Section 556(dd)).

Finally, Congress mandated that HUD use a negotiated rulemaking ("reg neg") process to develop its new rule (Section 556 (b)).

B. The Negotiated Rulemaking Process

In a negotiated rulemaking, the agency responsible for developing a new rule or regulation seeks to engage representatives of groups likely to be affected by the rule in drafting it. These representatives, invited, convened and organized as a federal advisory committee and working directly with agency representatives, provide advice and recommendations to the agency, with the goal of reaching consensus on a draft rule. The agency, while it retains final decision-making authority, commits to be guided by the work of the committee in its decision-making, especially if a consensus is reached.

By working directly with all relevant stakeholders, the agency should be better able to develop a rule that reflects the knowledge and perspectives of all stakeholders, meets their interests and needs more creatively and efficiently than a rule developed without their input, and has the political and organizational support of both the agency and the stakeholders.

For the reg neg process to succeed, both the agency and other stakeholders must commit to negotiate in good faith. They need to send representatives who have the authority to speak for their organizations /constituencies. During the negotiation process, they need to gather and analyze factual information jointly, seek to understand each others' interests and concerns, and be creative and flexible in developing options to meet the interests of all the groups involved.

Under the Negotiated Rulemaking Act of 1996, the agency may use a neutral facilitator to assist in the reg neg process. In the initial or "convening" phase of the process, the facilitator's tasks are to assist the agency in identifying stakeholders; interview agency and non-agency stakeholders to learn their concerns; and draft a Convening Report. The Convening Report summarizes the range of stakeholder views on key substantive and process issues and makes a recommendation on whether and how to proceed with the reg neg.

If the reg neg does proceed to the negotiation phase, the facilitator's tasks are to assist the group in seeking consensus on its goals, ground rules, and work plan; facilitate meetings of the full group and working groups; and facilitate the preparation and review of the draft rule. Throughout the process, the facilitator seeks to assist the group in raising and answering questions of fact, exploring and understanding each other's interests and concerns, generating options to satisfy those interests and concerns, ensuring that the group operates in accord with its own goals and ground rules, and helping to resolve disagreements when they arise.

For the tenant-based Section 8 reg neg, HUD has signed a cooperative agreement with the Consensus Building Institute (CBI) to facilitate the reg neg, and

separately with Andersen Consulting to analyze the potential financial implications of different allocation rules on HUD, PHAs and other stakeholders. This Convening Report summarizes CBI's findings and recommendations on the proposed tenant-based Section 8 reg neg. It is based on CBI's interviews with stakeholders during March and early April 1999.

C. CBI's Interviews with Potential Stakeholders

CBI began the negotiated rulemaking process by interviewing potential stakeholder representatives identified by HUD. To assist CBI in the interview process, HUD initially identified individuals representing five stakeholder categories:

- HUD representatives in the Office of Public and Indian Housing;
- national associations representing the interests of PHAs and private rental property owners;
- individual PHAs (selected to represent diversity of size and region);
- anti-poverty advocacy and affordable housing organizations directly and indirectly representing the interests of Section 8 voucher and certificate holders; and
- independent public accountants (IPAs) who assist PHAs in meeting HUD budget and accounting requirements.

HUD Deputy Assistant Secretary Gloria Cousar sent a letter to each of 29 potential stakeholders identified by HUD, explaining HUD's interest in convening a negotiated rulemaking and asking the individual to speak with CBI staff about Section 8 allocation issues.

In its interviews with persons suggested by HUD, CBI identified additional potential stakeholders by listing stakeholder groups and asking whether there were other stakeholders and/or particular individuals who should be contacted. Based on feedback from the interviewees and additional discussion with HUD, CBI interviewed several additional potential stakeholders. The total number of potential stakeholders interviewed for this report, including HUD staff who participated in a group interview in Washington, D.C., is forty-two (see Attachment 1, Persons Interviewed).

In each interview, CBI staff introduced themselves, and explained briefly the purpose of the call. They also explained that interviewees' comments would be summarized in the convening report without attribution to any individual, and that a list of persons interviewed would be attached to the convening report.

CBI then followed an interview protocol that described the scope of the reg neg, and then asked about the interviewee's personal and organizational involvement with tenant-based Section 8 issues; the goals that the program funding allocation

rule should seek to achieve; the specific issues that the rule should address; technical information and types of analysis that participants thought might be need; concerns about the reg neg process; and the interviewee's interest and ability to participate in the reg neg (see Attachment 2, CBI Interview Protocol).

D. The Convening Report

The rest of the convening report is organized as follows:

- description of the interim rule (Section II.A)
- stakeholder views on the goals that the rule should try to achieve (Section II.B)
- stakeholder views on the major substantive issues that the rule should address (Section II.C)
- stakeholder views on the way the new rule should be implemented and administered (Section II.D)
- stakeholder views and concerns about the reg neg process (Section III)
- CBI's conclusions on the feasibility of convening a representative stakeholder group and reaching consensus on an allocation rule, and CBI's recommendation to proceed with the reg neg (Section IV).

Following the report are several attachments:

1. List of Persons Interviewed by CBI
2. CBI's Interview Protocol
3. HUD Notice of December 30, 1998, "Renewal of Expiring Contracts in the Section 8 Tenant- Based Program During Federal Fiscal Year 1999 (Notice PIH 98-65 (HA))
4. HUD Charter for the Advisory Committee
5. Draft Mission Statement for the Advisory Committee
6. Draft Ground Rules for the Advisory Committee
7. Draft Work Plan for the Advisory Committee

II. THE ALLOCATION RULE

This section begins with a summary of the interim allocation rule that is currently in effect. It then presents stakeholder views heard in interviews on the goals that the allocation rule should try to achieve, and on several key substantive issues: establishing the baseline, calculating actual costs, adjusting costs and administering the rule.

A. The Interim Rule for Federal Fiscal Year 1999

1. Description of the Interim Rule

In late December 1998, HUD published an interim allocation rule for Federal Fiscal Year 1999: "Renewal of Expiring Contracts in the Section 8 Tenant Based Program During Federal Fiscal Year 1999" (see Attachment 3, Notice PIH 98-65 (HA)). This rule will expire at the end of calendar year 1999, and will be replaced by the rule that is developed through the reg neg process.

In (greatly simplified) mathematical form, the rule works as follows:

$$\begin{aligned} &\text{Oct. 1, 1997 adjusted baseline number of units} \\ &\times \\ &(\text{Most recent year end statement expenditures} \div \text{total leased unit months}) \times 12 \\ &\times \\ &\text{Annual Adjustment Factor (inflating from time of most recent year end} \\ &\text{statement to FY 1999)} \\ &= \\ &\text{FY 1999 ACC budget authority.} \end{aligned}$$

Following is a simplified narrative description of how the interim rule works.

Under the interim rule, HUD established a baseline number of units for each PHA as of October 1, 1997 (using the actual number of leased units as indicated by PHAs or the ACC number of units as indicated by HUD's HUDCAPS system), plus any additional incremental units HUD authorized to be added to the PHA's ACC during Federal FY 1998, and any replacement tenant-based units added to the ACC as replacements for expiring Mod Rehab Housing Assistance Payment contracts.

Under the interim rule, HUD also established a procedure for determining annual cost per unit. To determine annual cost per unit, HUD divided the total

annual contributions expended in the PHA's last fiscal year by the number of unit months leased. HUD then inflated the monthly unit cost using Section 8 Annual Adjustment Factors (AAFs) established for major metropolitan areas and regions. HUD then multiplied the monthly unit cost by 12, and added \$5 per unit to fund an increase in the administrative fee.

To determine the budget authority to be allocated to each PHA, HUD took the PHA's annual per unit cost and multiplied it by the number of expiring units for that PHA for FY 1999.

2. Stakeholder Views on the Interim Rule

There appears to be broad agreement among stakeholders both that the interim rule is a useful starting point for discussion and that it needs revision.

From HUD's point of view, the current, interim rule is an important step toward an accounting and budgeting system that is based on PHAs' actual costs. It is also relatively easy to understand and administer. On the other hand, HUD is concerned that the rule does not provide adequate incentives for cost containment or for meeting other program performance goals.

HUD is also aware that the current rule creates a disincentive for PHAs to lease additional units beyond the number authorized in their ACC, even if they can afford to do so, because a higher number of units leased means a lower per-unit cost and therefore a lower budget authority for the following year. (HUD and some other stakeholders refer to this problem of increasing the number of units leased in year one and then being forced to cut back in year two as the "rubber band problem.")

Other stakeholders, including most PHAs, agree that providing funding on the basis of actual costs is reasonable, and that the current rule is relatively easy to understand and administer. At the same time, many feel that HUD's baseline-setting process needs to be revisited; annual unit cost calculations need to be smoothed or averaged to avoid wide year-to-year swings in funding, especially for smaller PHAs; AAFs need to reflect more accurately the cost of housing for particular PHAs; and without re-creating the system of long-term contracts, PHAs should have more certainty about the availability of funds over multi-year periods in order to plan and manage their local Section 8 programs.

Some stakeholders (including some PHAs, IPAs and advocates for low income families) are interested in exploring the possibility of building cost containment and other performance incentives into the renewal funding formula. Others are concerned that any process that increases competition among PHAs for funds

could have negative impacts on relationships among PHAs, on relationships between PHAs and HUD, and possibly on public perceptions of the Section 8 program.

B. Goals for the New Allocation Rule

As noted above, both HUD and other stakeholders have indicated that they recognize the need for revisions to the current rule, and that they are interested in working together to improve it. Along with their comments on the details of the allocation rule, we asked interviewees to suggest some broad goals that the rule should be designed to achieve. They responded by naming one or more of the following goals:

1. continue to provide assistance to all households currently enrolled in the tenant-based Section 8 program for as long as they remain in need of and eligible for assistance;
2. promote efficiency in the use of tenant-based Section 8 funds, in order to free up funds so that more families can be assisted and to maintain the program's credibility with Congress, the Administration, and the public;
3. ensure that the rule is perceived as fair by HUD, PHAs, and other stakeholders;
4. create as much stability, predictability and certainty of funding as possible;
5. promote the use of the most accurate and up-to-date data on individual PHAs' costs and needs;
6. develop guidelines and procedures for HUD and PHAs that are as clear and simple as possible, and are consistent with other HUD guidelines;
7. promote effective administration by clearly designating administrative roles and responsibilities within HUD, and by thoroughly informing and educating HUD and PHA staff about their respective roles and responsibilities;
8. make the rule revenue neutral (i.e. the new rule should have no direct impact on HUD's budget for the tenant-based Section 8 program);
9. make the rule more responsive to actual needs, by including some measure of need in the allocation rule.

There was broad agreement among stakeholders on the legitimacy of the first seven of these goals. On the other hand, some stakeholders may disagree about the priority that each of these goals should have, in the event that trade-offs are required. For example, there may be trade-offs between using the most accurate data and making funding as stable and predictable as possible; in this case, stakeholders may need to negotiate to find a balance between these goals.

It is not clear that stakeholders are in agreement on the last two goals—revenue neutrality and need-based assistance. Revenue neutrality appears to be a more important goal for HUD than for other stakeholders. HUD feels strongly that both the current Congressional budget agreement and Congressional sentiment mean that Congress is highly unlikely to increase funding for the Section 8 program beyond inflation adjustments. No other stakeholders mentioned revenue neutrality explicitly as a goal. Nevertheless, a number of our interviewees did not think the program would be able to grow in the next several years. If so they may embrace the goal of revenue neutrality not because they support it in principle, but because they see it as the most realistic basis for program planning.

The idea of need-based assistance was mentioned in several of our interviews, by representatives of several stakeholder groups. However, even those who supported need-based assistance in principle felt that it may be very difficult to put into practice. Establishing criteria and procedures for assessing need could be technically difficult and politically controversial. It also might conflict with the goals of developing a rule that all stakeholders perceived as fair and one that would be relatively easy to administer.

In summary, there appears to be broad agreement among stakeholders on several overarching goals, a range of opinion about the feasibility and desirability of revenue neutrality and need-based renewal funding, and no evidence of sharp disagreement on any of these goals.

C. The Substance of the Allocation Rule

Our interviewees identified three key substantive issues that need to be addressed in the allocation rule: setting the baseline; calculating actual costs; and adjusting for changes in actual costs.

In addition, interviewees mentioned three issues that are not directly related to the allocation rule, but which have an impact on PHA budgeting and accounting: the FMR ceiling, the rule requiring 75% of Section 8 units to be allocated to families with income below 30% of median, and the merger of the

Section 8 voucher and certificate programs. It is not clear whether or how these three issues could be addressed within the scope of the allocation rule.

1. Setting the Baseline

As noted above, the interim rule includes a procedure for setting the baseline number of units, in response to the Congressional mandate set in the QHWRA. Stakeholder views on the current procedure ranged from a desire to switch from a unit-based to a budget-based procedure, to maintaining the current procedure and setting up an auxiliary procedure to resolve outstanding disagreements with particular PHAs, to maintaining the current procedure and resolving outstanding disputes case-by-case.

Some of our interviewees thought that the basic procedure is flawed, because it uses units rather than dollars to set the baseline. These interviewees felt that using units to set the baseline had created a number of implementation problems, because of the disjuncture between ACC and actual units leased and the potential for perverse incentives to rent more units than could be sustained in order to get a higher baseline. They thought that it would be preferable to set the baseline in terms of budgets for FY 1998, and to make future allocations in terms of dollars rather than units.

Others felt that the basic idea of using units to set the baseline is sound, but agreed that the implementation of the procedure to date has not been fully satisfactory. They raised four main concerns about the way the baseline had been set (several interviewees gave specific examples of these concerns):

- some PHAs may not have abided by a HUD directive to freeze new leases during the period of time when HUD was attempting to set the baseline;
- where HUDCAPS data on actual and ACC units were different from PHA data, disagreements were not always resolved to the mutual satisfaction of HUD and the PHA;
- in some cases, PHAs that had leased more units than authorized in their ACCs had their unit baseline set lower than the actual amount of units leased, with the result that they have lost budget authority for FY 1999 and have had to reduce the number of vouchers and certificates through attrition;
- HUD made some ad hoc adjustments to individual PHAs' baselines, raising questions about the transparency and fairness of the adjustment process.

Several PHA and IPA interviewees commented that they did not see a need to reopen the whole baseline setting process, but they would like to see some explicit guidelines on how HUD and PHAs will resolve any outstanding disagreements about the baseline. Other interviewees felt that the baseline issue has been resolved to the satisfaction of the vast majority of PHAs, and that further policy guidance may not be necessary.

2. Calculating Actual Costs

For purposes of calculating renewal funding, the interim rule says that HUD should begin by calculating the prior fiscal year unit cost. To do so, HUD takes the prior year ACC budget and divides it by the total number of unit months leased, to generate an average monthly unit cost. It then multiplies this number by 12 to get the average annual unit cost.

Almost all of our interviewees indicated that they understand and support the goal of moving to an "actual cost" basis for renewal funding. There is broad agreement that the previous FMR-based system did create budget and accounting problems, and that an actual cost funding system is necessary to avoid the accumulation of excess HUD budget authority and program reserves.

On the other hand, a number of PHA and IPA interviewees are concerned that the current cost calculation procedure does not allow for enough adjustment of costs to local circumstances. Specifically, they are concerned that using only a one-year average for calculating actual costs may lead to large swings in funding from year to year. For some PHAs with small Section 8 programs (e.g. fewer than 500 units), lease-up rates may vary by 25 percent from year to year. If so, a PHA with a low lease-up rate in one year may generate a very large renewal allocation for the next year, lease more units that year, and get a much smaller per-unit allocation the third year.

Another concern is that for smaller PHAs, annual costs may change significantly if the distribution of families among different unit sizes changes. Under current rules, PHAs are not allowed to maintain separate waiting lists for different unit sizes; they must issue the next available voucher or certificate to the next family on the list. For a small PHA, this "first come, first serve" issuing requirement increases uncertainty about total program costs, because it could result in a substantial increase in the percentage of larger (and more expensive) units within a single year.

In order to address these problems, a number of interviewees suggested that HUD should increase flexibility by using some kind of rolling multi-year average as the basis for unit cost calculations. For example, it was suggested that

HUD could use the PHA's average unit cost over the past three years as the basis for renewing funding.

Some interviewees took their concerns one step further, proposing that actual cost calculations should not include the number of units leased. Instead, they suggested that the calculation should simply renew the prior year funding (dollar amount), with an adjustment for housing cost inflation and possibly for changes in tenant incomes. In their view, this system would give PHAs maximum flexibility to decide for themselves how to make trade-offs between housing more families and providing more assistance per family (up to the FMR limits established by HUD).

Finally, several PHA and IPA interviewees felt that the calculation of PHA administrative fees should be addressed as an element of actual costs. These fees are calculated as a percentage of each PHA's ACC. These interviewees noted that as HUD has revised its accounting and budgeting procedures, it has determined that administrative fees in some instances were unjustifiably high, and reduced them. The interviewees said that the fee reductions had come at a time when PHAs were being asked to take on greater responsibility for involving Section 8 households in HUD's welfare reform initiatives. As a result, a number of PHAs are not being adequately compensated for the additional administrative and service responsibilities HUD has asked them to assume.

Some interviewees also commented that the current administrative fee calculation creates inequities between PHAs with very small and very large Section 8 programs. The lower the percentage, the greater the risk that the fee will under-compensate PHAs with very small programs. The higher the percentage, the greater the risk that it will over-compensate PHAs with very large programs. These interviewees suggested that HUD should consider developing an actual cost formula for administrative fees, based on the actual administrative budgets for individual PHAs.

3. Adjusting Actual Costs

To adjust actual costs, the interim rule multiplies the per unit cost by an annual adjustment factor (AAF) set by HUD for each major metropolitan area and region. HUD then multiplies this figure by the number of units which need to be renewed for the coming year. This unit number includes Section 8 units whose contracts are expiring plus new units entering the tenant-based Section 8 program as conversions from other programs, plus new units for which HUD has additional incremental funding.

Interviewees raised several concerns about the current process. Nearly everyone we interviewed indicated that the current AAFs are not accurate enough to capture changes in housing costs for individual PHAs. A number of PHA representatives indicated that they were very unsure how the AAFs are calculated, and would like HUD to explain the procedure.

Several interviewees noted that they are not sure how they can challenge or change HUD's determination of their AAF. Some commented that there is a procedure for challenging HUD's FMR determination, which involves conducting a telephone survey to obtain a statistically valid sample of local rents, is very costly and time-consuming. Some PHA representatives feel that they know the local rental market quite well and can easily demonstrate to HUD that rents have risen faster than the AAF would suggest. If HUD continues using AAFs, they want to have a simpler and less costly way to gather and present evidence on local rents.

A number of interviewees said that they would like to explore the possibility of replacing AAFs with some more locally-based system for calculating cost inflation. This system might set up a procedure for PHAs to gather and present rent data to HUD, or might designate data held by other Federal, state and/or local agencies as the basis for housing cost adjustments.

Another concern raised by some interviewees is that a single annual adjustment may not be enough to cover all contingencies, especially for small PHAs, PHAs serving markets where rents are rising fast, or PHAs serving markets with sudden increases in demand for Section 8 assistance (e.g. due to local layoffs or plant closings). Some interviewees suggested that HUD could create a central contingency fund; PHAs could draw from this fund if they could demonstrate exceptional need. Others thought that the current central and local reserve funds and exception rent policies could be adjusted to deal with these contingencies.

The second factor in the cost adjustment calculation is the number of units to be renewed. The main concern raised about accounting for units was the so-called "rubber band" problem of expanding and contracting per-unit costs and funding allocations. Interviewees made two main suggestions for dealing with this problem: multi-year averaging of the number of units to be renewed, and doing away with the unit-based renewal system in favor of a "pure" dollar-based system.

Some interviewees raised another concern about using units in the cost adjustment calculation: they felt that the current system does not give PHAs enough incentives to encourage portability of vouchers and certificates. A portable voucher or certificate is "lost" to the PHA that issues it, and therefore

cannot be counted for the next year. They strongly encouraged HUD to review its portability accounting procedures to ensure that there is no disincentive to allow portability and that both the "old" and the "new" PHA allocations are treated fairly.

Finally, several interviewees thought that the current cost adjustment system is missing an important component: performance incentives. For example, one interviewee thought that a PHA which used less than 90 percent of its budget, or achieved less than a 90 percent lease-up rate over several years, should have its annual renewal amount cut back. Conversely, a PHA which successfully moved a substantial number of families out of the program through Family Self Sufficiency and other initiatives should not be penalized by losing funding the following year. Instead, it should be able to use some of its "excess" funding to support its self-sufficiency work.

4. Other Issues

Several interviewees were interested in seeing whether the reg neg could address three additional issues that are not directly related to the allocation rule, but which do have an impact on PHA budgeting and program management: 1) the current FMR ceilings; 2) the rule that requires PHAs to allocate 75% of their units to households with income below 30% of median; and 3) the merger of the Section 8 voucher and certificate programs.

Some interviewees noted that HUD had recently reduced FMR ceilings from the forty-fifth percentile to roughly the forty-first percentile of metro/regional market rents. They felt that in some PHAs with tight housing markets, the reduction has significantly reduced the ability of Section 8 voucher and certificate holders to find housing. The reduction in the FMR ceiling may also make it harder for PHAs to achieve poverty deconcentration goals, because the lower ceiling tends to restrict Section 8 holders to poorer neighborhoods.

Several interviewees also raised concern about the requirement for 75% of vouchers and certificates to be issued to families with incomes below 30% of median. For some PHAs, this rule has created a situation in which vouchers and certificates are not being used, either because there is not enough demand from the population below 30% of median or because this group is not able to find housing or both. At the same time, some PHAs are building up waiting lists of families with incomes between 30% and 50% of median. Several interviewees suggested that if it were possible to modify or make exceptions to the rule, vouchers and certificates could be used more efficiently and more families could be helped.

Some interviewees asked whether the merger of the Section 8 voucher and certificate programs could be addressed within the allocation reg neg. They felt that there might be some "spillover" from decisions about how to merge the two programs into PHA accounting and budgeting.

Other stakeholders, particularly HUD representatives, thought that it probably would not be possible to address the three issues mentioned above within the scope of the allocation rule. They indicated that the statutory and regulatory guidelines under which HUD is operating, and the tight time-frame for the reg neg, give HUD very limited flexibility to address issues that fall outside the bounds of the allocation rule.

On the other hand, HUD representatives noted that HUD might organize a separate public consultation on the merger of the voucher and certificate programs, so that it might be possible for stakeholders with a strong interest in the merger to give input in another forum.

B. Implementation /Administration of the Rule

The focus of most interviewees was on the funding allocation formula and the baseline and inflation factors noted in the previous section. However, there were several issues that were mentioned often enough during our interviews to merit attention. Most of the interviewees expressed an interest in helping to design and implement an improved rule and system that will be flexible as well as fair to all. There was a consistent stream of comments about the need for transparency, that is, candid, clear and open communications with and by HUD. In addition, interviewees said they hope to develop a rule that will be understandable and easy to administer.

Comments and concerns about these issues are summarized below under the general categories of flexibility, fairness, transparency and ease of administration. These issues are best described as principles and values that the interviewees frequently said should infuse any recommended rule and methodology.

1. Flexibility

Interviewees emphasized the need for HUD to build more flexibility into any new rule recommended by the reg neg committee. A recurring recommendation was that HUD should build flexibility into all rules (especially the Section 8 allocation and baseline setting method) and formulas as a component of the agency's focus on improved customer service. The requests for flexibility included suggestions for more creative and open problem solving at all levels of

the organization - agency headquarters and in regional and local offices; and in all processes, e.g. renewal calculations, adjustments, forms, data submissions, etc. Some interviewees said they understood that flexibility did not mean an open ended and unmanageable system for HUD, but they encouraged more of a responsive attitude and a greater willingness to adapt in order to achieve the agency's mission.

The most common suggestion made by interviewees was for more responsiveness to local needs. Over and over again, examples were given of the need for HUD to respond in a more flexible manner to the particular concerns of a local PHA or state agency or community. Some people said that HUD field office staff needed to be given more encouragement to be flexible in solving problems and responding to requests for help. Many interviewees described their experiences with rapid changes in the formula used by HUD for Section 8. (One interviewee said that "if the formula changes four times the housing agencies need some sense that they will be treated with understanding and flexibility.")

Interviewees described how their programs needed to be flexible in response to HUD-mandated changes and therefore they were only looking for reciprocal flexibility from HUD, especially during transitions and changes in policy. Some asked for HUD to "be able to translate the rule to different contexts - state, local, urban, rural." Several interviewees suggested that "HUD allow home rule flexibility" and encourage and reward PHA's that assist as many people as possible." There were a variety of comments made about how increased flexibility could increase efficiency and save money. One interviewee said that "flexibility could help reduce rent inflation." Some people suggested having the local housing agencies determine what the mix of Section 8 tenant incomes should be.

Most interviewees were curious to learn about and see the data describing differences among locales. Many people asked HUD to "acknowledge the differences between large urban providers and smaller rural agencies and be equitable and responsive." Other examples of scenarios where flexibility was suggested were: "setting fair market rents as locally as possible," having an "allowance for local diversity in market costs," "discern between underachievers and overachievers and develop performance incentives," and looking at the 90 day delay issue.

Some interviewees indicated a hope that HUD could distinguish between standard costs and additional costs and individual issues. Others asked if HUD could "understand the challenges encountered at PHA's and get flexible regarding the allocation of funds to families making more than 30% of median

income contributions." Several people asked HUD to reflect on the need to be flexible about how data are compiled; some suggested using quarterly or semi-annual data reports. A few interviewees wondered whether the one year renewal process was written in stone. They asked whether HUD could renew funding for two or three years at a time. Finally, some interviewees urged HUD to resolve existing adjustment problems with flexibility as a way of modeling a new approach to resolving these concerns and to show good faith in advance of these negotiations.

2. Fairness

Interviewees more often than not suggested that a principle of fairness and consistency ought to be incorporated into the discussion, the final outcome of this reg neg, and the committee's recommendations. Most of the people interviewed said that HUD must aim for "greater fairness based on actual costs." There were many comments about the need to be fair in dealing with policy transitions. Similar to the comments made about the need for flexible responses from HUD were the suggestions about a need for "fairness in how adjustments are made" and that "the allocation numbers need to make sense and reflect reality." Several interviewees said that it was only fair to have "predictability of renewal funding" and an ability "to count on the program so they can do mid-range planning."

Many interviewees stated that if HUD knew more about the differences among PHAs and had an understanding of their diverse needs and circumstances, there would be a greater likelihood of fairness in implementation and administration. There were several requests for HUD to take more account of slow years and anomalies and be fairer in how it develops adjustment mechanisms.

Specific suggestions included using a three year average for determining baselines, to provide a fairer and more realistic gauge of housing needs than a one-year average. In addition, some said that they needed clarity on exception policies and PHA reserve accounts. Several said that HUD needed to be forthright and to share data as a way of showing a commitment to fairness. A variety of stories were told about what interviewees labeled the unfairness and circularity of how rules are administered. One example mentioned by several interviewees was the lack of reward for performance and efficiency.

Many interviewees expressed concern about the fairness of unfunded mandates for new programs (e.g. Self Sufficiency, Welfare to Work, Family Unification,

etc.). The people who mentioned these examples generally supported the goals of the new programs, but suggested more flexible approaches that could be fairer and still accomplish the program goals. Some said that it was fine to "have regular audits if necessary but not just for nitpicking and to micro-manage." In general, interviewees shared a sense that fairness was related directly to accurate data and flexibility about accomplishing the goal of providing housing.

The perceived lack of commitment to fairness was mentioned when interviewees told their version of the problems they faced dealing with many changes in rules and formulas in a short time. There was a persistent concern about "mixed signals" from HUD, and a request for "clarity about expectations, so we can plan." Interviewees noted that they hoped there would be a way to avoid contradictions and confusion in the future.

These comments indicated a common interest in developing effective working relationships between stakeholders and HUD that were based on increased transparency. Several interviewees said that fairness in the implementation and administration of any new rule will help build trust and make it easier to work together with HUD in the future.

3. Transparency

Almost everyone interviewed mentioned the need to address directly and openly the difficulties created by changes in the allocation method over the past year. Several interviewees defined transparency as candid and open communications about issues such as how ACC numbers are calculated. One person said that HUD needs to participate freely in the negotiations and should "not worry about misstatements." A few said that doing this negotiation may be a first step toward a more open and responsive approach to the difficulties of implementation and administration.

An example of successful and effective communication mentioned by several interviewees was the Nashville Section 8 conference last year. Interviewees said that at the conference, HUD explained its interests clearly, sought input and listened to stakeholders. Many interviewees acknowledged that HUD had been through tough times because of the problems and fall out from the changes in Section 8 methods and the politics of recaptured reserves, and they wanted the agency leadership to know they want to help, be supportive and work together.

Some people said that staff turnover at HUD has created some concerns and confusion and that there was a need to handle this better by letting PHAs and other stakeholders know about personnel transitions; some even suggested asking for help from stakeholders. As stated earlier in the fairness section,

interviewees urged HUD to be clear about its expectations and crisp and understandable when making explanations. Interviewees sought access to useful data and numbers and hoped HUD would be open to criticism and suggested improvements. One interviewee said that "when HUD has policy goals, they have to state them and own them."

Most if not all of the comments made about transparency seemed to indicate a willingness to find common ground and to build on the shared mission and goals they have with HUD and its staff. Interviewees frequently said that to build trust and working relationships, HUD needed to be consistently open and responsive to criticism. One source of frustration was the HUDCAPS and MTCS databases, and the battles about whether their numbers are accurate. Several people were resolute in saying the HUD numbers were inaccurate and that they needed an opportunity to show why and provide input. A few people suggested that mutual trust would increase when the stakeholders know HUD is listening and that they are being heard.

4. Ease of Administration

A comment by one interviewee that "we are not expecting miracles" reflects the common sense approach sought by most people. Interviewees said they want to help develop workable solutions that make sense and will help them make projections and manage programs and budgets well. Some people wanted assurances that they would not have to continue to be in a "guessing game." Others asked for HUD to look at how it gives directions and try to be clearer. Some said that it would be easier to administer the Section 8 rule and program if there were a sharing of accurate, current and timely information so problems could be solved quickly and even anticipated or prevented. Several interviewees expressed the view that funds need to be delivered on time or continued program operation could be jeopardized. Others wanted to understand how all of the Section 8 components and initiatives were linked and said that a "holistic" approach might help them make better sense of what was happening.

Interviewees mentioned several possible ways to improve program administration. Suggestions included: orientation sessions for PHAs when there are changes, a commitment to better customer service (several comments were made about deficiencies in customer service for smaller PHAs), quicker responses to inquiries, timely access to data and information, and implementation of complaint resolution systems. A specific suggestion was to use electronic technologies more effectively. For example, HUD could make all data available on the Internet, even if for viewing only, and perhaps allow PHAs to submit reports to HUD more often via computer.

Another suggestion was to be sure that "there was recourse, review, correction and accountability" when people have disputes or problems. Several requests were made for guidelines for troubleshooting and correcting problems. A variety of concerns were raised about the need to understand the way data are developed whether it is SEMAP, MTCS, FMR, etc. A few people asked for ways to address anomalies quickly, others wanted to reduce the paperwork burden on owners and some still wanted to revisit consideration of multi-year funding. Each suggestion came in response to a request for ideas about administrative improvement.

Several of the interviewees said that the negotiated rulemaking process was a terrific opportunity for HUD and other stakeholders to find effective, respectful and creative ways of working together. Although interviewees said they realized the scope of this committee's work was limited; several people thought the committee should keep a running list of suggestions for systems redesign, communications and improvements in joint problem solving. Another idea mentioned was to record and acknowledge opportunities to start data gathering and monitoring when it appears this is an unmet need. These interviewees said they wanted to optimize the contributions of the stakeholders.

III. PROCESS ISSUES

The interviewees were asked to state their suggestions and concerns about the proposed negotiated rulemaking process. Most comments can be summarized under three headings: 1) the committee mandate and how the recommendations will be used; 2) representation on the committee from HUD and other stakeholders; and 3) the need for data and joint fact-finding during the negotiations.

A. Committee Mandate, Roles and Responsibilities

Most of the interviewees said the reg neg process sounded worthwhile and that they were interested in participating. The interviewees expressed a range of views on the goal of a consensus draft rule -- from enthusiastic interest to cautious optimism to "let's wait and see." A few interviewees were skeptical and concerned about the expectation for a consensus rule that will meet all constituents' interests. A universal comment was that the time frame might be too tight and unrealistic. Only a handful of people mentioned any prior experience with the reg neg process as described by CBI. However, some did say they had been invited to serve on informal advisory groups on similar topics in the past. Several stated that they were honored to be considered for possible participation.

Everyone seemed to agree that it is essential that HUD state clearly what the scope of the committee's mandate is. Interviewees said that they need to know at the outset what issues will and will not be on the agenda. Some were concerned about the three HUD regulatory negotiations occurring at one time. Several organizations noted concerns about limited resources and time and the strain this could create. A request was made to use alternates as a way of addressing some groups' staffing and resource limits.

A few interviewees suggested incorporating language into the ground rules about how HUD's commitments will be made and communicated. One interviewee said that we need to be clear about what constituent "buy in" will be and how to communicate about what consensus means to the group. A few people encouraged strong leadership by HUD at the negotiating table, others suggested shared leadership by HUD and stakeholders.

Several interviewees asked for meetings away from HUD and on neutral ground. Prospective participants from western locations encouraged consideration of other than Washington, D.C. meeting sites for reasons of budget, itinerary and fairness. Interviewees also asked if as many meetings as possible could be scheduled Monday-Tuesday or Thursday-Friday. A number of interviewees also said that they would be much more likely to participate if HUD could reimburse their travel and accommodation costs.

Most interviewees said they understood that they would not be making final decisions on the rule but rather serving as an advisory committee. Several noted that this delegation of problem solving was an opportunity to creatively craft a consensus that "helps HUD promulgate fair and effective rules." Additional concerns were raised about how HUD and the committee will publicize the negotiations and consensus proposals. Some said there would need to be safeguards to encourage open communications, respect confidences when necessary, and protect the integrity of the process.

B. Representation

As noted in the introduction, interviewees were asked for their thoughts about representation on the committee. The most common response was that the categories of prospective stakeholders would depend on the scope of the conversations. If the negotiation is narrow and limited to devising a new allocation method then many said the current list was sufficient. However, if the agenda is broader and permits review of additional related issues such as mobility, deconcentration, and related concerns then most interviewees said other groups should be included.

The interviewees' suggestions for prospective categories of participants included: rental property owners and managers, real recipients of Section 8 funds, elected officials, law firms, consultants, accountants, small PHAs, large PHAs, and representatives who fulfill criteria such as regional diversity, successful and progressive programs, advocacy roles, tenure, etc. Many interviewees noted the need to balance the value of increased input and participation with a manageable process and focused agenda. Many people said they believed that "the more input the better" for HUD and the committee. Several people said there might be ways to include additional participants as resources and advisors to the committee and its working groups.

C. Data, Technical Assistance and joint Fact-Finding

Interviewees were pleased to learn about the prospect of HUD developing options and models of alternate scenarios for the Section 8 allocation issues. CBI described briefly to every interviewee its understanding of the data gathering and analytical role that Anderson Consulting will play during the reg neg. Almost everyone said they look forward to seeing a matrix or model allocation method to test options and real case scenarios. A few people noted that it would be better to have some of the information about models available before each meeting. Several interviewees expressed concerns about the models and underscored the fact that they need to be understandable, well done and accurate.

Many interviewees expressed interest in comparative data across types of PHAs. In addition several indicated a desire to bring their own data to show what goes on where they work.

There was a considerable list of data requests from interviewees, including:

- complete breakdown of process for calculating renewals;
- HUDCAPS explained and Internet access provided;
- exploration of divergence between local PHA data and HUDCAPS and MTCS data;
- comparison of local cost inflation data with AAFs;
- analysis of PHA administrative costs for different sizes and types of PHA (e.g. urban vs. rural);
- exception rents and changing markets;
- comparison of lease-up rates, use of reserves, waiting lists and other indicators of program utilization among PHAs.

Several interviewees said they hope that when there is a question about data that HUD will be responsive and give timely answers. Most said that the availability of data and information will make the negotiations more effective. Some wondered how the CBI team will work with the stakeholders to help find

information, data and numbers in a timely and effective way. Others asked that HUD or others provide technical advisors to the process, especially accountants and others with a background in Section 8.

Most of the interviewees said they understood that joint fact finding would be facilitated to encourage fair and open review of options. Several emphasized that HUD needs to let the committee know if it has concerns about the options it creates, and the reasons for its concerns, so that the committee can respond effectively. One interviewee emphasized the need to address information sharing early. This person said that HUD and other stakeholders need to be explicit about what information they need, say in what sequence they need the information, and from whom so the committee can make sure that the rule is developed using the best available information.

IV. CONCLUSIONS AND RECOMMENDATIONS

In deciding whether to proceed with the negotiated rulemaking on the allocation of tenant-based Section 8 renewal funding, HUD and other stakeholders should consider two key questions:

- is it possible to convene a committee representing the key stakeholders--those who are highly likely to be interested in and significantly affected by the new rule?
- if it is possible to convene a group of key stakeholders, does it appear reasonably likely that they will be able to reach consensus on all or almost all key issues with the time and resources available?

In the judgment of the facilitation team, the answer to both of these questions is a qualified "yes." Following are the facilitation team's current assessment of these two questions, and our recommendation to proceed with a first meeting of the Advisory Committee.

A. Ability to convene a group representing key stakeholders

As noted in the introduction, HUD initially identified five key stakeholder groups for this negotiated rulemaking: national associations representing the interests of PHAs and private rental property owners; individual PHAs representing diversity of size and region; anti-poverty and affordable housing organizations that directly and indirectly represent the interests of Section 8 voucher and certificate holders; independent public accountants who work with PHAs; and HUD itself.

Based on our interviews, the facilitation team believes that it is appropriate to include representatives from these five stakeholder groups, and it appears that representatives from each of groups are interested in and able to participate. In our judgment and the judgment of most of our interviewees, the interested and available stakeholder representatives do provide adequate representation of the groups most directly affected by the rule.

In addition to those representatives already identified, it may be appropriate for HUD to invite participation from one or more additional organizations that directly represent the interests of private rental property owners and low income families that participate in the Section 8 program. Currently, none of the organizations that HUD proposes to include is primarily dedicated to representing the interests of these two groups.

Among the potential stakeholder groups, these two may be least directly affected by the allocation formula, and if the focus of the reg neg remains on the details of the formula, they may have limited interest in participating. On the other hand, their perspectives may be important in discussions about the overarching goals that the rule should achieve, in joint fact-finding about the way the program is operating in different settings, and about the way the rule will be implemented and administered.

HUD has encouraged the facilitation team to contact additional individuals and organizations that represent these two groups to see whether they are interested in participating. In addition, HUD is reviewing self-nominations submitted during the 30 day public comment period and passing on information about these self-nominations to the facilitation team for review and follow-up.

Finally, it may be possible to represent some stakeholder interests in a more concentrated way, through presentations to the full group, participation in working groups, and/or review and comment on draft materials. These opportunities for representation and participation would need to follow the committee's ground rules and be supported by committee members.

B. Potential for the group to reach agreement within the time and resources available

This report has summarized the range of views we heard on the goals the reg neg should seek to achieve, and on key substantive and process issues.

In our judgment, there is significant and encouraging convergence among the relevant stakeholders on a number of overarching goals. On each substantive issue, there was significant convergence on the strengths and weaknesses of the current, interim rule. There was more diversity of views on what modifications should be made to the rule. Nevertheless, the stakeholders took an open-minded, problem-solving approach in their conversations with us, and there appears to be substantial potential for the stakeholders to develop new options that might meet the interests of all.

With regard to the process, there will be several challenges. First, there is the challenge of generating accurate information in a timely fashion. Stakeholders will need technical, financial and administrative information to answer questions about the current allocation process and to explore the effects of possible new rules on each stakeholder group. A number of interviewees stressed very strongly the need for HUD and others to make sure that committee members have relevant data and information well before each meeting.

Though HUD and its database analysis consultants will bear the primary responsibility for providing data to the group, it is also important for other representatives to ensure that the group has a clear understanding of their interests and concerns, and to provide the group with information that is relevant at each stage of the negotiation process.

Time management will be a second major challenge. The time-frame for this reg neg is very short, and a significant amount of work will need to be done in June, July and potentially August. It will be essential for representatives to commit to attending all meetings of the group, to participate in working groups if they are necessary and appropriate, and to keep their organizations and constituencies well-informed throughout the process, so that there are "no surprises" when participating organizations are asked to make a formal indication of their support for a draft rule.

A third process challenge will be to explore and address concerns about fairness and transparency in the allocation rule. Some of these concerns have arisen from miscommunication among the stakeholders in the recent past, while others are more long-standing. The informal but structured setting of the reg neg provides an excellent opportunity for the stakeholders to understand each others' concerns and to find creative ways to address them. It will be important for stakeholders to come to the table ready to talk about these concerns, and equally ready to look to the future in developing standards of fairness they can agree on and procedures that provide maximum transparency.

Finally, it will be important for HUD representatives to ensure that senior agency decision-makers are apprised of the progress of the reg neg, so that HUD can give clear guidance to other stakeholders about the political and administrative feasibility of options that are proposed. In addition, it will be important that the group hear the views of headquarters and regional staff who are knowledgeable about and involved in the implementation of the rule. HUD representatives have already indicated their commitment to both of these process goals.

C. Recommendations

Based on the information available to us at this time, the facilitation team recommends that HUD proceed to convene a first meeting of the stakeholders, chartered as a Federal Advisory Committee (see Attachment 4, HUD Charter for the Negotiated Rulemaking Advisory Committee). It is our understanding that this meeting will take place on Tuesday April 27 and Wednesday April 28 in Washington, D.C.

In preparation for that meeting, we have drafted and attached the following items for consideration by potential participants (see Attachments 5-7):

- Draft Mission Statement for the Advisory Committee
- Draft Ground Rules for the Advisory Committee
- Draft Work Plan for the Advisory Committee

We expect that these items will be the focus of the discussion on April 27 and 28.

We request that all persons we have interviewed review and comment on this Convening Report by Wednesday April 21. Please address your comments to the CBI staff person who interviewed you:

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If for any reason you cannot contact the CBI staff person who interviewed you, please address your comments to David Fairman at CBI.

We are grateful to all of the individuals who took the time to speak with us about Section 8 allocation issues, and we look forward to your comments on this report.